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90-1661

Supreme Court, U.S.
FILED
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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

JAMES CONSTANT,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

James Constant
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Claremont, CA 91711
(714) 624-1801

pro se petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Does the explicit adjudication that a patent is not a contract, in the underlying judgement dismissing the complaint, deprive the trial court's jurisdiction under the Tucker Act?

2. Is a patent a contract?

3. Does denial of a writ of certiorari in the prior decision of the underlying judgement make that decision final?

4. Can sanctions be based on a voidable prior decision not part of the underlying case?

5. Does the power to sanction appeals under App. Rule 38 include the power to consider past and future decisions over which the court lacks existing jurisdiction?

6. Does the power to sanction appeals under App. Rule 38 include the power to sanction post-appeal motions?

7. What is the standard for determining frivolous appeals in App. Rule 38 and does lack thereof offend due process and equal treatment?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioner, James Constant, respectfully prays that a writ of certiorari issue to review the corrected Judgement of the United States Court of Appeals for the Federal Circuit dated 25 March, 1991.

OPINION BELOW

The Court of Appeals for the Federal Circuit issued its judgement attached as APPENDIX A affirming the Judgement of the United States Claims Court attached as APPENDIX B holding that petitioner's motion, filed 14 August, 1990, to vacate pursuant to RUSCC 60(b)(4) is denied.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254(1).

STATEMENT OF THE CASE

Petitioner's complaint for breach of contract contends that a patent is a contract. By Order No.295-88C (May 18, 1988) the United States Claims Court sua sponte dismissed the complaint pursuant to Rule 12(b)(4) of the Rules of the United States Claims Court (RUSCC). The Claims Court ruled that "as a matter of law the issuance of a patent by the Patent and Trademark Office (PTO) does not create a contractual obligation between that office and the patentee". APP. A-4. By decision No. 88-1426 (September 13, 1988) the Court of Appeals affirmed the trial court's decision and petition for certiorari No.88-728 (January 9, 1989) was denied by this Court.

Petitioner's RUSCC 60(b)(4) motion contends that the judgement on the complaint is void for lack of jurisdiction under the Tucker Act. By Judgement No.

295-88C (August 15, 1990) the United States Claims Court sua sponte denied the motion to vacate. By decision No. 91-5005 (March 25, 1991) the Court of Appeals affirmed the trial court's denial of the motion as untimely and as compelled by the law of the case. The motion was deemed frivolous and petitioner was sanctioned pursuant to Rule 38 of the Federal Rules of Appellate Procedure to pay the government its attorney fees and double costs. APP. A-19. By errata No. 91-5005 (March 25, 1991) the court deleted the words "untimely and as" from its "CONCLUSION". APP A-20. As corrected, therefore, the Court of Appeals affirmed denial of the motion to vacate "as compelled by the law of the case". The present petition for certiorari is from that corrected affirmance.

The claim court's jurisdiction for contract claims was invoked under 28 USC 1491(a)(1).

REASONS FOR GRANTING THE WRIT

1. The Explicit Adjudication That A Patent Is Not A Contract, In The Underlying Judgement Dismissing The Complaint, Deprives The Trial Court's Jurisdiction Under The Tucker Act

An appellate court's review on the ruling on a RUSCC 60(b)(4) motion is confined to the correctness of the ruling on the motion itself not the underlying order. Browder v Director Dept of Corrections (1978) 434 US 257, 54 LEd2d 521, 98 SCt 556, 24 FRServ2d 749, reh den 434 US 1089, 55 LEd2d 795, 98 SCT 1286. However, the appeals court denied the motion not on the correctness of the trial court's ruling on the motion to vacate but on the underlying judgement dismissing the complaint for failure to state a claim.

n1. The court sanctioned petitioner for raising the same issue which, as held, was correctly (APP. A-4: held a patent is not a contract) and finally (APP. A-10: held denial of petition for certiorari is final) determined in the judgement dismissing the complaint. In fact, the complaint alleges the trial court's jurisdiction under 28 USC 1491 and therefore the lack of jurisdiction issue raised by the motion to vacate was not litigated at trial which dismissed the complaint sua sponte.

Accordingly, dismissal of the underlying judgement under RUSCC 12(b)(4), whether or not that dismissal is error, does not extend the trial court's jurisdiction beyond its existing jurisdiction created by 28 USC 1491 which

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n1. The complaint did state that petitioner spent 21 months litigating his patents and incurred costs of over $1,000,000 which, if jurisdiction exists under 28 USC 1491, sufficiently states the claim.

limits the court's jurisdiction "to render judgement upon any claim against the United States founded . . . upon an express or implied contract with the United States". n2. The explicit adjudication in the underlying judgement that a patent is not a contract precludes denial of the RUSCC 60(b)(4) motion.

Because the complaint alleges breach of patent contract and because the underlying judgement held that a patent is not a contract, the trial court lacked jurisdiction under the Tucker Act. n3. There is

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n2. The Rules do not extend a court's jurisdiction in suits against the United States. United States v Sherwood (1941) 312 US 584, 85 LEd 1058, 61 SCt 767. They merely impliment the exercise of existing jurisdiction which has been conferred by statute. Edwards v E.I. Du Pont De Nemours & Co. (CA5 1950) 183 F2d 165. Civil Rule 82 provides generally that the Rules shall not be construed to extend the jurisdiction of the courts.

n3. If a contract exists (as alleged in the complaint) jurisdiction exists to determine petitioner's money claim (cont'd next page)

no question of discretion on the part of a court when a motion is under RUSCC 60(b)(4). Wright and Miller Section 2862 Note 73 numerous citations; Brazosport Towing Co. v 3,848 Tons of Sorghum (SD Tex 1984) 607 F Supp 11 aff'd w/o opinion (CA5) 790 F2d 891 (Void judgement is legal nullity and court considering motion to vacate has no discretion in determining whether it should be set aside); V.T.A., Inc v Airco, Inc. (CA10 1979) 597 F2d 220, 202 USPQ 650, 27 FRServ2d 468; Hicklin v Edwards (CA8 1955) 226 F2d 410; Jordon v Gilligan (CA6 1974) 500 F2d 701 cert den 95 SCt 1996, 421 US 991, 44 LEd 481.

Judgement therefore affirming denial of the RUSCC 60(b)(4) motion as compelled by the law of the case (APP. A-19) is in-

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which the trial court did not do. If a contract does not exist (as held by the trial court) jurisdiction does not exist to determine the merits of the money claim. The judgement dismissing the complaint is void for either reason.

opposite to the explicit adjudication in the underlying judgement dismissing the complaint that a patent is not a contract and is inopposite to the rulings by this Court for confining reviews to the correctness of motions not to underlying judgements, for rules not extending powers beyond existing jurisdiction and, to rulings by other circuits that, when considering motions to vacate, the court has no discretion.

Since the Federal Circuit sanctions petitioner on the basis of the correctness and finality of the underlying judgement and on the basis of Constant, infra, a case unrelated to the issues at bar, petitioner is hereafter compelled to argue against the correctness and finality of the underlying judgement, and against validity of the judgement in Constant, infra.

2. This Court and All Other Courts Of Appeals, Including The Predecessor Court Of The Federal Circuit, Who Have Considered The Matter Have Held That A Patent Is A Contract

In Grant v Raymond, 31 US (6 Pet) 218, 241-42, Mr. Chief Justice Marshall held that a patent is a contract on the part of the United States. The rule that a patent is a contract is held by all other courts who have considered the matter including Davis Airfoils v U.S., 1954, 124 FSupp 350, 129 CtCl 514 cert den 75 SCt 437, 348 US 950, 99 LEd2d 742, the predecessor court of the Federal Circuit. See National Carbon Co. v Western Shade Cloth Co., CCA Ill. 1938, 93 F2d 94, cert den 58 SCt 1039, 304 US 570, 82 LEd 1535, reh den 58 SCt 1054, 304 US 590, 82 LEd 1549; H.C. White Co. v Morton E. Converse & Son Co., CCA NY 1927, 20 F2d 311 cert den 48 SCt 85, 275 US 547, 72 LEd 419; Luten v Kansas

City Bridge Co., CCA Mo. 1922, 285 F 840; Tomkins Hawley Fuller Co. v Holden, CCA NY 1921, 273 F 424; I.T.S. Rubber Co. v Essex Rubber Co., DC Mass. 1920, 270 F 593, rev on other grounds 281 F 5, appeal dismissed 42 SCt 45, 257 US 664, 66 LEd 424; Railroad Supply Co. v Hart Steel Co., Ill. 1915, 222 F 261, 138 CCA 23, mtn den without prejudice 37 SCt 16, 242 US 609, 61 LEd 525 rev on other grounds 37 SCt 506, 244 US 294, 61 LEd 1148; Fried Krupp Aktien-Gesellschaft v Midvale Steel Co. Pa. 1911, 191 F 588, cert den 32 SCt 526, 223 US 728, 56 LEd 633; O.H. Jewell Filter Co. v Jackson, Mo. 1905 140 F 340, 72 CCA 304. See also Daniel v O&M Mfg Co., DC Tex 1952, 105 F Supp 336; U.S. v Hartford Empire Co., DC Del 1947, 73 FSupp 979; Owen v Paramount Productions, DC Cal 1941, 41 FSupp 557.

Judgement therefore affirming denial of the RUSCC 60(b)(4) motion as compelled

by the correctness of the underlying judgement dismissing the complaint (APP. A-4) is inopposite to the rulings by this Court and other courts of appeals holding that a patent is a contract.

3. Denial Of A Writ Of Certiorari In The Prior Decision Does Not Make Legal Conclusions Final

Sanctions were imposed "solely on our determination that his appeal is frivolous as filed" because petitioner "has twice been explicitly warned in opinions of this court that his prior conduct uas frivolous, and that if he persists by trying to raise again the same issues that have been finally decided . . . he could be sanctioned under Fed.R.C.P. 11, F.R. App. P. 38" quoting a decision in Constant v Advanced Micro-Devices, 868 F2d 1560, 1572, 7 USPQ2d 1057 (CAFC 1988) cert den 488 US 892 (APP. A-15), a case not related to the present breach of contract case and

motion to vacate.

Without citing authority, the court stated that "the denial of his petition for certiorari made the legal conclusions in our prior decision final and law of the case, and Constant is barred from attempting to relitigate them". APP. A-10. However, this Court has repeatedly held that the denial of a writ of certiorari imports no expression of opinion upon the merits of a case. Polites v United States, 364 US 426, 5 LEd 2d 173, 81 SCt 202; Maryland v Baltimore Radio Show, Inc., 338 US 912, 94 LEd 562, 70 SCt 252; United States v Carver, 260 US 482, 67 LEd 361, 43 SCt 181. A denial of certiorari is not to be equated with an affirmance of the judgement below or the dismissal of an appeal. United States v Brennan (DC Minn) 134 FSupp 42, 36 BNA LRRM 2652, 28 CCH LC 69457. Hamilton Brown Shoe Co. v Wolf Bros. & Co., 240 US 251, 60 LEd 629, 36 SCt 269; Smith v

Slayton (WD Va) 369 FSupp 1213. See also US LEd Digest, Appeal & Error, 910.8.

Previous denials of certiorari by this Court do not foreclose it from granting appropriate relief, Chessman v Teets, 354 US 156, 1 LEd2d 1253, 77 SCt 1127. If, as in the present case, certiorari is denied earlier in litigation, and a subsequent petition for certiorari is later granted in the same litigation, the Court, on the second petition for certiorari, may grant the petition and then consider questions raised by both petitions. Mercer v Theriot, 377 US 152, 12 LEd2d 206, 84 SCt 1157, reh den 377 377 US 973, 12 LEd2d 743, 84 SC 1643,

Judgement therefore affirming denial of the RUSCC 60(b)(4) motion as compelled by the finality of the underlying judgement dismissing the complaint (APP. A-10) is inopposite to the rulings by this Court

on the non-finality of denials of certiorari.

4. Sanctions Are Based On A Judgement Which Was Rendered By The Courts Below Without Jurisdiction And In Violation Of Due Process

In Constant, supra, petitioner filed an action for patent infringement claims (28 USC 1338). Petitioner's two patents were found invalid under 35 USC 102 and 103. APP. A-3. The judgement therefore covers issues of defense not claims of the complaint. Constant, supra, stands for the proposition that claims in a complaint can be defeated by issues of defense. However, Section 1338 jurisdiction is over claims in the complaint not issues of defense. Congress did not create an express cause of action to enforce 35 USC 102 and 103 of the patent laws, and there is no implied cause of action under

Sections 102 and 103. No patent claim of the complaint was litigated in the case to confer jurisdiction of the subject matter to the court under 28 USC 1338. Christianson v Colt Industries (1988) 108 SCt 2166, 100 LEd2d 811. Anticipation of a defense based on federal law contravenes the whole trend of jurisdictional legislation by Congress, disregards the effective function of the federal judicial system. Id 2180. Jurisdiction is not determined by examining only the initial complaint but by ascertaining whether a claim of the complaint was litigated in the case. Id 2181. In Constant, supra the issues that were actually litigated were issues of a patent law defense of invalidity not infringement claims of the complaint.

Further, under the venue statute 28 USC 1400(b), when petitioner lays his venue "where the defendant has committed acts of infringement", personal jurisdic-

tion is determined when infringement is shown to exist. Since no patent claim of the complaint was litigated the judgement in Constant, supra did not comply with the venue statute so as to confer personal jurisdiction over the parties in that case.

The judgement in Constant, supra was obtained in violation of due process. A judgement is void if issueing court acted in manner inconsistent with due process of law. Wright and Miller Section 2862 Note 83 numerous citations. Even if a court has jurisdiction, a court which proceeds in such an arbitrary or improper manner that its action may be said to constitute a denial of due process the judgement is void. Windsor v McVeigh (1876) 93 US 274,23 LEd 914 (without hearing or opportunity to be heard).

Since infringement claims in Constant, supra were never actually litigated, the

courts below deprived petitioner of a fair opportunity procedurally, substantively, and evidentially to pursue his patent infringement claims. Molinaro v American Tel. & Tel. Co. (ED Pa 1978) 460 F Supp 673, 204 USPQ 221 aff'd without op. (CA3 Pa) 620 F2d 288 citing Blonder-Tongue Laboratories v University of Illinois Foundation (1971) 402 US 313,333, 169 USPQ 513,521.

Thus, regardless whether the courts had jurisdiction of the subject matter or the parties, as discussed previously, the courts below did not give petitioner the opportunity to be heard, failed to litigate his claims for infringement, failed to follow the jurisdictional statute requiring trial of claims in the complaint, and failed to follow the federal rules requiring the making of final judgements, determinations of causes of action, and entry of judgements on infringement

claims. Since the courts acted in manner inconsistent with due process, the rendering of the judgement in Constant, supra, without giving petitioner a hearing on his claims, without acting on his claims, and without following the jurisdictional statute requiring trial of claims in the complaint, is void. Windsor, supra.

The judgement therefore in Constant, supra, is voidable because the courts below rendering judgement lacked both subject matter and personal jurisdiction and acted in manner inconsistent with due process. A void judgement is a nullity entitled to no recognition. Vecchioni v Wohlgemuth (ED Pa 977) 426 F Supp 1297, 23 FRServ2d 221, aff'd (CA3) 558 F2d 150, cert den 434 US 943, 54 LEd 304, 98 SCt 439; 46 AmJur2d, Judgements Sections 14,49,683. No sanction can be based on a

void judgement. n4.

5. The Power To Sanction Appeals Under App. Rule 38 Does Not Include The Power To Consider Past And Future Decisions Over Which The Court Lacks Existing Jurisdiction

Like any rule, App. Rule 38 does not extend the Federal Circuit's jurisdiction. United States v Sherwood, supra. It merely implements the exercise of existing jurisdiction for hearing appeals under 28 USC 1295(a)(3) and the trial court's jurisdiction for petitioner's patent contract claim under 28 USC 1491(a)(1). Edwards, supra.

Accordingly, the Federal Circuit's

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n4. The judgement in Constant, supra may be collaterally attacked in any proceeding in which the effect of the judgement comes in issue and, if the judgement is void, it should be treated as legally ineffective in the present proceeing. Comprehensive Merchandizing Catalogs, Inc. v Madison Sales Corp., (CA7 1975) 521 F2d 1210 citing Treatise.

jurisdiction to hear petitioner's motion to vacate lacks jurisdiction to consider the unrelated case in Constant, supra and the underlying judgement dismissing the complaint as elements for the purpose of imposing sanctions under App. Rule 38 in the present motion under existing jurisiction. Constant, supra and the underlying judgement dismissing the complaint are relevant only to the extent that res judicata and collateral estoppel apply. However, no claim or issue of these prior decisions applies to the issue of jurisdiction in the motion to vacate at bar.

For the same reasons, the Federal Circuit lacks jurisdiction to direct the Clerk of that court to accept for filing no motion, petition, pleading or other fileable paper from petitioner without an order of the court approving the filing. APP. A-19. Clearly this sanction applies to any future claim or issue over which

the court lacks existing jurisdiction and which claim or issue, if filed, can be dealt with under the doctrines of res judicata and collateral estoppel and, if frivolous, can be sanctioned under the court's then existing jurisdiction. Moreover, the order to the clerk abridges explicit patent laws and policy. Statute 35 USC 271(d) provides that a patent owner otherwise entitled to relief for infringement shall not be "denied relief . . . by reason of his having (3) sought to enforce his patent rights against infringement" and is a clear expression of public policy approving patent actions.

The sanctions therefore in the judgement to vacate (APP. A Part II) based on the unrelated case in Constant, supra, on the underlying judgement dismissing the complaint, and on the order to the clerk extend beyond the Federal Circuit's existing jurisdiction.

6. The Power To Sanction Appeals Under App. Rule 38 Does Not Include the Power To Sanction Post-Appeal Motions

Like all rules, App. Rule 38 applies to appeals from the district courts. App. Rule 1(a). n5. Jurisdiction exists under 28 USC 1295(a)(3) to hear appeals. Since App. Rule 38 merely implements the exercise of existing jurisdiction for hearing appeals under 28 USC 1295(a)(3) (Edwards, supra), sanctions under App. Rule 38 apply to appeals not to pleadings, motions, or other papers. n6.

Accordingly, the Federal Circuit lacks jurisdiction to impose sanctions under App. Rule 38 in the post-appeal RUSCC 60(b)(4) motion to vacate. The

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n5. RUSCC 11 applies to pleadings, motions, or other papers.

n6. It has been held that Civil Rule 11 does not apply to procedings in the courts of appeals. Brayley v Campbell 832 F2d 1504,1510 (CA10 1987); Hill v Norfolk & Western Ry. Co., 814 F2d 1192 (CA7 1987).

sanctions therefore in the judgement to vacate (APP. A Part II) in the post-appeal motion extend beyond the provisions of App. Rule 38 and the Federal Circuit's existing jurisdiction.

7. The Standard For Determining A Frivolous Appeal in App. Rule 38 Is Arbitrary And Offends Due Process And Equal Treatment

App. Rule 38 provides that sanctions are appropriate if the appeals court determines that an appeal is frivolous. n7.

In order for an appeal to be frivolous it must be more than unsuccessful. Burlington n7. What more is required is a matter of considerable uncertainty. WSM,

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n7. The purpose of App. Rule 38 is to penalize the appellant for his frivolous appeal and to compensate the appellee. Burlington Northern R.R. Co. v Woods, 480 US 1, 107 SCt 967, 94 LEd2d 1 (1987). The Federal Circuit adds the additional purpose of deterring future frivolous appeals. Asberry v U.S.Postal Service 692 F2d 1378,1382 (CAFC 1982).

Inc. v Tennessee Sale Co., 709 F2d 1084, 1088 (CA6 1983). No standard therefore exists for determining what more is required.

The RUSCC 60(b)(4) motion was deemed frivolous because of the asserted correctness (APP. A-4: held a patent is not a contract) and finality (APP. A-10: held denial of petition for certiorari is final) of the underlying judgement dismissing the complaint, and the prior warnings in the unrelated case Constant, supra that sanctions will be imposed in the future if petitioner raises the same issues that have been finally determined. APP A-4. n8.

However, the RUSCC 60(b)(4) motion

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n8. Applying the warning in Constant petitioner was sanctioned allegedly for raising the same issue in the motion to vacate. In fact, the lack of jurisdiction issue raised in the motion to vacate was not litigated at trial which dismissed the motion sua sponte. APP. A-6.

was not so frivolous as to support an award of attorney's fees and double costs. In his brief on appeal petitioner cited authority (n9.) which was directly adverse to the ruling on the motion. And, by the authority of this Court, denial of writ of certiorari in the underlying judgement dismissing the complaint does not impart finality on that judgement. See Part 3, supra. Finally, the warning in Constant, supra is not relevant because the money claim issues in the underlying judgement dismissing the complaint and the jurisdictional issue in the motion to vacate are different.

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n9. also cited in Part 2 supra, namely, that this court and all other courts of appeals have held that a patent is a contract.

The lack of standard for determining what is frivolous offends due process and equal treatment which require the consideration of the sanctioned party's ability to pay. The sanction did not consider petitioner's ability to pay.

Accordingly, the Federal Circuit lacks a standard in App. Rule 38 for imposing sanctions in appeals. The sanctions therefore in the judgement to vacate (APP. Part II) are arbitrary.

CONCLUSION

In the motion under RUSCC 60(b)(4), in the underlying case for breach of patent contract, and in the patent action of Constant, supra, the Federal Circuit has rendered decisions and made sanctions without existing jurisdiction. n10. These decisions are in conflict with the decisions of this Court and of all other courts of appeals, have so far departed from the jurisdictional statutes, and have repeatedly allowed such departures by the

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n10. Inopposite to Christianson, supra, the Federal Circuit has affirmed other cases solely on issues of defense without litigating causes of action. As result many patent holders, including petitioner, have had their patents held invalid without being given the opportunity to litigate infringement claims of their complaints. Until this Court speaks, petitioner is compelled to attack these decisions at every opportunity notwithstanding the Federal Circuit's warnings that he will be sanctioned "if he persists by trying to raise again the same issues that have been finally decided . . .". APP. A-11.

lower courts, so as to call for an exercise of this Court's power of supervision.

The Federal Circuit's void judgements for lack of jurisdiction, and that court's imposition of sanctions beyond existing jurisdiction, are legal nullities, disregard the jurisdictional legislation and undermine the effective functions of the federal judicial system.

The petition should be granted and the judgement denying petitioner's motion under RUSCC 60(b)(4) should be reversed. The Court should consider the questions whether a patent is a contract raised in the underlying case and whether the judgement in Constant, supra is void for lack of jurisdiction.

Respectfully submitted

Date: 7/22/91

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

91-5005

JAMES CONSTANT,

Ptaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: March 25, 1991

Before MARKEY, MICHEL, and RADER, Circuit Judges. MICHEL, Circuit Judge.

James Constant appeals the order of the United States Claims Court, Constant v United States, No. 295-88 C (CI. Ct. Aug. 15, 1990), dismissing his motion, pursuant to Rule 60(b)(4) of the Rules of the United States Claims Court (RUSCC), to vacate that court's previous dismissal of his complaint, Constant v. United States, No. 295-88 C (CI. Ct. May 18, 1988), aff'd, 861 F.2d 728 (Fed. Cir. 1988) (table), cert. denied, 488 U.S. 1007 (1989). Because Constant's RUSCC 60(b)

motion was untimely, and because in any event, contrary to Constant's contentions, the Claims Court did have personal and subject matter jurisdiction when it entered the 1988 judgement and did not violate Constant's right to due process, we affirm. And because Constant's appeal is plainly frivolous, we grant the government's request for sanctions pursuant to Rule 38 of the Federal Rules of Appellate Procedure and order Constant to pay the government its attorney fees and double its costs.

BACKGROUND

In 1985 James Constant filed suit in the United States District Court Eor the Central District of California, charging several high technology companies with infringement of two patents he owned, and asserting various other theories of recovery, including challenges to the constitutionality of certain provisions of Federal

patent law and of federal funding of research and development. The court eventually dismissed all counts except the infringement claim for failure to state claims on which relief could be granted, and on summary judgement, held the two patents invalid. In June 1988, we affirmed the dismissal and judgement of invalidity, Constant v. Advanced Micro-Devices, 488 F.2d 1560, 7 USPQ2d 1057 (Fed. Cir.), cert. denied, 488 U.S. 892 (1988), noting as to Constant's novel constitutional theories, that "[b]ecause of appellant's earnest efforts to support his positions, we deal with them in greater detail than their merits deserve." Id. at 1563, 7 USPQ2d at 1058. We also stated:

> The district court went to great lengths to be fair and has shown great patience in the face of arguments and tactics that would have been improper if advanced by a lawyer. . . . In the past the appellant has repeatedly attempted to reassert or revive claims and theories after they have been properly dismissed with prejudice by the district court. Appellant is

> hereby cautioned that if he persists by trying to raise again the same issues that have been finally decided by the district court or by this court, he could be sanctioned under Fed. R. Civ. P. 11, Fed. R. App. P. 38, and the inherent power of the courts to sanction.

Id. at 1572, 7 USPQ2d at 1065-66 (emphasis added).

On May 16, 1988, while that appeal was still pending, Constant filed a complaint against the government in the United States Claims Court seeking reimbursement for the costs of litigating and defending the two patents, on the theory that the government had breached "patent grant contracts" by issuing to him two patents containing defects for which they were later held invalid. The Claims Court dismissed the suit sua sponte, holding "as a matter of law that the issuance of a patent by the Patent and Trademark Office does not create a relationship between that office and the patentee." Constant v. U.S., No. 295-88 C, slip op. at 1 (May 18,

1988). Constant appealed the dismissal to this court, and we affirmed in an unpublished opinion, Constant v. U.S., No. 88-1426 (Fed. Cir. Sept. 13, 1988), in which we cautioned Constant against further attempts to litigate the issue:

> This appeal is frivolous; however, we do not sanction Constant in this instance because this appeal was filed prior to the issuance of Constant [v. Advanced Micro-Devices]. Nonetheless, we reiterate the admonition in that opinion--"[a]ppellant is hereby cautioned that if he persists by trying to raise again the same issues that have been finally decided . . . he could be sanctioned under Fed. R. Civ. P. 11, Fed. R. App. P. 38, and the inherent power of the courts to sanction."

Id., slip op. at 2 (emphasis added). The United States Supreme Court denied Constant's petition for a writ of certiorari. 488 U.S. 1007 (1989).

On August 14, 1990, over two years after the Claims Court's May 1988 dismissal, already made final on appeal, Constant filed a motion for relief from the dismissal pursuant to RUSCC 60(b)(4). Constant's

motion asserted (1) that because "[t]he Government did not appear in the action and no claim of the complaint was joined on the merits" the Claims Court lacked personal jurisdiction over the government when it dismissed his complaint in 1988; (2) that the 1988 Order "is void under 60(b)(4) because it did not decide a case or controversy within the meaning of the provision of Article III of the Constitution"; and (3) that the sua sponte dismissal in 1988 without advance notice to him or a hearing was in violation of due process of law. Supplemental Appendix at 99-101.

The Claims Court denied the RUSCC 60(b) motion immediately and sua sponte, Constant v. United States, No. 295-88 C (CI. Ct. Aug. 15, 1990), and Constant filed this appeal. We have jurisdiction pursuant to 28 U.S.C. 1295(a)(3) (1988).

DISCUSSION

I

RUSCC 60(b) provides that "on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgement, order, or proceeding for the following reasons: . . . (4) the judgement is void." RUSCC 60(b) also provides that such a motion "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgement, order, or proceeding was entered or taken." While the rule is thus silent as to what constitutes a "reasonable time" for a motion under reason (4), it does say that a delay of longer than a year is not reasonable for motions under (1), (2), or (3), which relate to, respectively, mistake or inadvertence, newly discovered evidence, and fraud by the other party.

Assuming without deciding that

despite Constant's two-year delay in filing, his RUSCC 60(b) motion was within a "reasonable time," 1/ the motion is nevertheless wholly without arguable merit. Constant seems to present three basic contentions on appeal. First, he maintains that the Claims Court had subject matter jurisdiction over his complaint in 1988 so that the dismissal was improper. This contention is irrelevant because the dismissal was not based upon lack of subject matter jurisdiction. On the contrary, the Claims Court explicitly acknowledged that it had such jurisdiction, Constant v. United States, No, 295-88 C, slip op. at 1 (CI. Ct May 18, 1988), but it dismissed

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1/ In Pfotzer v. United States, 231 Ct. Cl. 794, 796 (1982), our predecessor court held that under Local Rule 152(b)(4), the forerunner of RUSCC 60(b)(4), a seven-month detay was not reasonable. But see 7 J. Moore & J. Lucas, Moore's Federal Practice 60.25[4] (2d ed. 1990) (authority suggesting that when jurisdiction is attacked, anytime is within a reasonable time).

because the issuance of a patent does not create contractual rights and thus the complaint did not state a claim on which relief could be granted, RUSCC 12(b)(4). Id.

Second, Constant argues that the 1988 dismissal denied him due process of law because the sua sponte dismissal before the government even entered an apperance did not allow him to litigate his claims in court, and because the court's judgement of dismissal cited no precedent. But it is the validity of the judgement not the vality of any opinion supporting it, that has legal significance, and the court's failure to cite any cases has no relevance to whether the court reached the correct legal result. Nor is due process violated by a dismissal, even sua sponte, for failure to state a claim. As our earlier decision affirming the dismissal held, Constant's "patent grant" contract

claim was untenable as a matter of law, and no additional proceedings could have enabled Constant to prove any set of facts entitling him to prevail on his claim for relief. Under the circumstances, Constant was not entitled, as he contends, to advance notice or an opportunity to brief or argue the point. The dismissal thus did not deny Constant due process of law.

Finally, he argues that this court's 1988 affirmance of the dismissal on the "patent grant" contract theory was legally incorrect. But the denial of his petition for certiorari made the legal conclusions in our prior decision final and law of the case, and Constant is barred from attempting to relitigate them.

II

The government has requested attorney fees and costs incurred in responding to Constant's appeal as sanctions under Fed. R. App. P. 38, which provides that "[i]f a

court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." On the basis of the briefs and the record on appeal, we have determined that Constant's appeal is frivolous and accordingly award the government its attorney fees and double its costs incurred in defending this appeal.

Taken together, our cases have adjudged frivolity under Rule 38 in two established senses. First, where "the judgement by the tribunal below was so plainly correct and the legal authority contrary to appellant's position so clear that there really is no appealable issue," the appeal is deemed frivolous as filed. Finch v. Hughes Aircraft Co., No. 90-1473, slip op. at 10 (Fed. Cir. Feb. 27, 1991). In the second type of frivolity, "while genuinely appealable issues may, exist, the appellant's contentions in prosecuting

the appeal are frivolous," and the appeal is deemed frivolous as arqued. Id. at 11.

Constant's appeal is founded solely upon legal theories which have been explicitty rejected by this court in Constant's prior appeal in this very same case. We hold therefore that Constant's present appeal, in which "no basis for reversal in law or fact can be or is even arguably shown," Octocom Systems, Inc. v. Houston Computer Servs., Inc., 918 F.2d 937, 943 (Fed. Cir. 1990) (quoting Connell v. Sears, Roebuck & Co., 772 F.2d 1542, 1554 (Fed. Cir. 1983), is frivolous as filed.

Logically, an appeal which is frivolous as filed must also be frivolous as argued, since any arguments made in support of it are, by definition, frivolous. Finch, slip op. at 13. This is certainly true here: Constant "has made numerous irrelevant arguments," id. at 19,

and has sought to "relitigate issues already adjudicated," id. at 11 (citing International, Ass'n of Machinists & Aerospace Workers v. Boeing Co., 833 F.2d 165, 172 (9th Cir. 1987), cert. denied, 485 U.S. 1014 (1988), and Trecker v. Scag, 747 F.2d 1176, 1180 (7th Cir. 1984), cert. denied, 471 U.S. 1066 (1985)). But because we are reluctant to condemn the arguments of a pro se litigant such as Constant, who despite his prior appeals perhaps cannot always be expected to appreciate the nuances of relevance in the same way a competent appellate lawyer would, we decline to base sanctions on our conclusion, though we do so hold, that his appeal is frivolous as argued. Instead, we rest our imposition of sanctions solely on our determination that his appeal is frivolous as filed. Constant's pro se status certainly does not prohibit us from sanctioning him for a frivolously filed appeal. Of

course, we never impose sanctions lightly, and are particularly cautious in the case of a pro se litigant, "whose improper conduct may be attributed to ignorance of the law and proper procedures." Finch, slip op. at 20. But we and our sister circuits have not hesitated to impose sanctions in cases "where even a non-lawyer should have been aware that his conduct was frivolous." Id. (citing numerous examples from this and other circuit courts). Such is unquestionably the case here.

Given his long history of litigation and relitigation of the same issues, we can only conclude that Constant "by this time is certainly not without some practical experience with the law." Ruderer v. Fines, 614 F.2d 1128, 1133 (7th Cir. 1980). Even more importantly, as we have noted above, Constant has twice been explicitly warned in opinions of this court that his prior conduct was frivolous

and that "if he persists by trying to raise again the same issues that have been finally decided . . . he could be sanctioned under Fed. R. Civ. P. 11, Fed. R. App. P. 38, and the inherent power of the courts to sanction." Constant v. U.S., No. 88-1426 slip op. at 2 (Fed. Cir. Sept. 13, 1988) (quoting Constant v. Advanced Micro-Devices, 848 F.2d at 1572). Given such clear, direct, and repeated warnings that the very arguments he here attempts to relitigate are frivolous, with citation to the specific rules under which he may be sanctioned, there is no escaping the conclusion that any reasonable person in Constant's position, even though a non-lawyer, would understand that the filing of this appeal is improper conduct which could subject him to sanctions.

Nor do the due process reqirements of notice and opportunity to be heard present any barrier to the imposition of sanctions

in a case like this one. As we have discussed, Constant was on notice long before this appeal was filed that he could be sanctioned if he continued to try to relitigate the issues herein. Moreover, two of the twelve pages in the government's brief in this case were devoted to a specific request for sanctions, 2/ and Constant had an opportunity in his reply brief to respond to this request and offer some explanation as to why he filed this appeal. Brief For Appellee at 10-12. He did not. Instead with considerable gall, he frivolously requested sanctions against the government. Informal Reply Brief for Appellant at 5.

We note finally that Constant cannot escape a determination of frivolity by his

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2/ Our "Practice Note" to Rule 38 invites litigants to call misconduct to our attention, and states: "A party whose case has been challenged as frivolous is expected to respond to the challenge in the reply brief or to voluntarily request dismissal of the case."

decision to waive oral argument and submit the case on the briefs. While the cost to the appellee and the burden on this court's resources may be reduced somewhat by a decision to waive argument, the goals of Rule 38 -- compensating the prevailing party for the costs of having to defend a frivolous appeal and keeping the appellate calender free for cases truly worthy of consideration, see Finch, slip op. at 9 -- are no less important in cases submitted on the briefs than in those on which oral argument is heard. Romala v. U.S., No. 90-5134, slip op. at 14 (Fed. Cir. March 12, 1991). "Waiving oral argument may have lessened somewhat the degree of damage done, but it has by no means eliminated it." Id. The Department of Justice has still been forced to expend time and effort in defending, and this court has still had to devote energy and resources to deciding, this wholly frivolous appeal.

Given the prior decision of this court in this and related cases, we deem the filing of this appeal to be clearly frivolous, just as Constant was warned it would be. Given the number of actions he has filed and the freqency and persistence with which he continues to attempt to relitigate the same theories which have consistently and finally been rejected as meritless, the inescapable conclusion is that Mr. Constant "is engaged on this appeal in 'recreational' litigation, misusing precious and limited resources better spent on meritorious claims of his fellow citizens to whom those resources belong." Beachboard v. United States, 727 F.2d 1092, 1095 (Fed. Cir. 1984). We remind him and others that litigation is serious business. This and other federal courts are funded by the taxpayers of this country to adjudicate genuine disputes, not to function as playgrounds for would-be

lawyers or provide an emotional release for frustrated litigants.

In light of Constant's continuous abuse of the appellate process, we cannot assume that papers he may hereafter file in this court will be well-founded and presented in good faith. Accordingly, we direct the clerk of this court henceforth to accept for filing no motion, petition, pleading or other fileable paper from James Constant without an order of the court approving the filing.

CONCLUSION

The order of the Claims Court denying Constant's RUSCC 60(b)(4) motion for relief from the judgement is affirmed as [untimely and as] compelled by law of the case. The appeal is deemed frivolous and Constant is ordered to pay the government its attorney fees and double its costs.

AFFIRMED - SANCTIONS IMPOSED.

A-20

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

March 25, 1991

ERRATA

Appeal No. 91-5005

JAMES CONSTANT v. THE UNITED STATES

Decided: March 25, 1991 Published

Please make the necessary correction:

Page [19], line [4],

under "CONCLUSION", delete the words "untimely and as".

IN THE UNITED STATES CLAIMS COURT

Filed Aug. 15, 1990

No. 295-88 C

JAMES CONSTANT

JUDGEMENT

V.

THE UNITED STATES

Pursuant to the court's order of August 15, 1990

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the plaintiff's motion, filed August 14, 1990, to vacate pursuant to Rule 60(b)(4) is denied.

Frank T. Peachtree

Clerk of Court

August 15, 1990

By:

Deputy Clerk

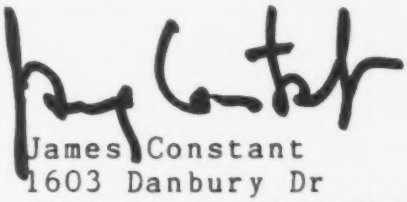
CERTIFICATE OF SERVICE

I certify that the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT was served by depositing the required number of copies in a United States Post Office with first class postage prepaid addressed as follows:

Chun-I Chiang, Attorney
Commercial Litigation Branch
Civil Division, Room 842
Department of Justice
Washington, D. C. 20530

Solicitor General
United States Department of Justice
Washington, D. C. 20530

Date: 4/22/91



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